



FEDERAL RESERVE SYSTEM

12 CFR Part 222

[Docket No. R-1484]

RIN 7100 AE14

Identity Theft Red Flags (Regulation V)

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is proposing to amend its Identity Theft Red Flags rule, which implements section 615(e) of the Fair Credit Reporting Act (FCRA). The Red Flag Program Clarification Act of 2010 (Clarification Act) added a definition of “creditor” in FCRA section 615(e) that is specific to section 615(e). Accordingly, the proposed rule would amend the definition of “creditor” in the Identity Theft Red Flags rule to reflect the definition of that term as added by the statute. The proposed rule would also update a cross-reference in the Identity Theft Red Flags rule to reflect a statutory change in rulemaking authority.

DATES: Comments must be received on or before **[Insert date 60 days after publication in the Federal Register]**.

ADDRESSES: You may submit comments, identified by Docket No. R-1484, by any of the following methods:

- Agency Web Site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for

submitting comments.

- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- FAX: (202) 452-3819 or (202) 452-3102.
- Mail: Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, D.C. 20551.

All public comments are available from the Board's web site at

<http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Kara L. Handzlik, Counsel, Legal Division, at (202) 452-3852, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, D.C. 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

On November 9, 2007, the Board, along with the other banking agencies¹ and the Federal Trade Commission (FTC) (collectively, the "Agencies"), published final rules and

¹ The other banking agencies included the Office of the Comptroller of the Currency (OCC); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision (OTS); and National Credit Union Administration (NCUA). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) added the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) to the list of agencies with rulemaking and enforcement authority under the Fair Credit Reporting Act with respect to the Red Flags rule. Pub. L. 111-203, 124 Stat. 1376 (2010).

guidelines on identity theft “red flags” (“Red Flags rule”) to implement section 615(e) of the Fair Credit Reporting Act (FCRA) (15 U.S.C. 1681m(e)).² The final rules require each financial institution and creditor that holds any consumer account, or other account for which there is a reasonably foreseeable risk of identity theft, to develop and implement an identity theft prevention program in connection with new and existing accounts. The program must include reasonable policies and procedures for detecting, preventing, and mitigating identity theft. The Agencies also issued guidelines to assist financial institutions and creditors in developing and implementing a program, including a supplement that provides examples of red flags.

The Red Flags rule, implemented in the Board’s Regulation V Subpart J, defines the terms “credit” and “creditor” by cross-reference to FCRA section 603(r)(5). 15 U.S.C. 1681a(r)(5). Section 603(r)(5) defines the terms “credit” and “creditor” by cross-reference to section 702 of the Equal Credit Opportunity Act (ECOA). ECOA section 702 defines “creditor” as “any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.” 15 U.S.C. 1691a(e). The ECOA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. 1691a(d). Thus, the FCRA’s red flags provisions have been broadly applied to banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies. 12 CFR § 222.90(b)(5).

² 72 FR 63718 (Nov. 9, 2007).

The scope of the Board's Red Flags rule is set forth in § 222.90(a), which states that the Board's rule applies to financial institutions and creditors that are state member banks (other than national banks) and their respective operating subsidiaries, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Financial institutions and creditors that are not covered by the Board's rule are covered by substantially identical rules issued by other federal agencies.

II. The Red Flag Program Clarification Act of 2010

On December 18, 2010, Congress enacted the Red Flag Program Clarification Act of 2010 (the Clarification Act).³ The Clarification Act amended section 615(e) of the FCRA (15 U.S.C. 1681m(e)) by adding a definition of the term "creditor" specific to section 615(e). The Clarification Act continues to define creditor by cross-reference to the ECOA's definition of creditor, but limits the application of the red flags provisions of the FCRA to only those creditors that regularly and in the ordinary course of business: (a) obtain or use consumer reports, directly or indirectly, in connection with a credit transaction; (b) furnish information to consumer reporting agencies, as described in FCRA section 623, in connection with a credit transaction; or (c) advance funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person. 15 U.S.C. 1681m(e)(4)(A).

The Clarification Act's revised definition excludes, however, those creditors that advance funds on behalf of a person for expenses incidental to a service provided by the creditor to that person. 15 U.S.C. 1681m(e)(4)(B). The legislative intent of narrowing the

³ Public Law No. 111-319, 124 Stat. 3457 (Dec. 18, 2010).

definition of “creditor” in the Red Flags rule was to exclude from coverage those persons that sell a product or service for which the consumer can pay later, such as lawyers and doctors.⁴

The Clarification Act also grants authority to the Board and the other agencies to determine, through a rulemaking, whether there are other creditors that offer or maintain accounts that are subject to a reasonably foreseeable risk of identity theft that should be subject to the Red Flags rule. 12 U.S.C. 1681m(e)(4)(C). The Board is not using its discretionary rulemaking authority at this time to extend the application of its Red Flags rule to additional creditors.

III. Proposed Amendment

The Board is proposing to amend the definition of “creditor” in Regulation V (12 CFR § 222.90) to conform the rule to the definition of “creditor” in FCRA as amended by the Clarification Act. As noted above, the existing definition of “creditor” in § 222.90(b)(5) makes a cross-reference to the general definition of “creditor” in section 603(r)(5) of the FCRA and provides a list of examples of lenders. The proposed revised definition of “creditor” in § 222.90(b)(5) would instead cross-reference the more limited definition of creditor in section 615(e) of the FCRA, which is specific to the statute’s red flags provisions. Accordingly, proposed § 222.90(b)(5) provides that “creditor has the same meaning as in 15 U.S.C. 1681m(e)(4).”

As discussed above, the Red Flags rule requires each financial institution and creditor that holds any consumer account, or other account for which there is a reasonably foreseeable risk of identity theft, to develop and implement an identity theft prevention program. Under the revised definition, creditors that do not regularly and in the ordinary course of business: (a) obtain or use consumer reports in connection with a credit transaction; (b) furnish

⁴ 156 Cong. Rec. S8289 (daily ed. Nov. 30, 2010) (statement of Sen. Dodd).

information to consumer reporting agencies in connection with a credit transaction; or (c) advance funds to or on behalf of a person, would no longer be covered by the rule. The Board notes, however, that the Red Flags rule still covers all financial institutions, regardless of whether they meet the revised definition of creditor.⁵

The Board is also proposing to update a citation in Supplement A to Appendix J of the Red Flags rule. Supplement A to Appendix J includes a cross-reference to the Board's definition of a "notice of address discrepancy" in Regulation V (12 CFR § 222.82(b)).

Pursuant to the Dodd-Frank Act, the Board's rulemaking authority for the notice of address discrepancy provisions of the FCRA (15 U.S.C. 1681c(h)) transferred to the Consumer Financial Protection Bureau (CFPB). Accordingly, the Board is proposing to update the cross-reference to the CFPB's definition of a "notice of address discrepancy" in the CFR's Regulation V § 1022.82(b).⁶

IV. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities. Based on its analysis, and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. A

⁵ The Board has consulted and coordinated with the other banking agencies, the FTC, the CFTC, and the SEC with respect to this proposed rulemaking to amend the Red Flags rule to conform it to the Clarification Act. The Board understands that the other banking agencies will act separately with respect to any necessary updates to each of the banking agency's Red Flags rules. The FTC issued an interim final rule that amends the definition of "creditor" in its Red Flags rule, consistent with the revised definition in the Clarification Act. See 77 FR 72712 (Dec. 6, 2012). The CFTC and SEC issued final Red Flags rules implementing section 615 of FCRA, which includes the definition of "creditor" as set forth in the Clarification Act. See 76 FR 23638 (Apr. 19, 2013).

⁶ The Board notes that there is no substantive difference between the Board's definition of a "notice of address discrepancy" and the CFPB's definition. The Board also notes that it plans to make further revisions to Regulation V outside of this Red Flags rulemaking to reflect changes in rulemaking authority.

final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. Statement of the need for, and objectives of, the proposed rule. As noted above, the Clarification Act amended the definition of “creditor” in the FCRA for purposes of the red flags provisions. The Board is proposing to amend the definition of “creditor” in its Red Flags rule to reflect the revised definition of that term in the Clarification Act. As also noted above, the Board is proposing to update a cross-reference in the Red Flags rule to reflect the CFPB’s rulemaking authority for the notice of address discrepancy provisions in the FCRA.

2. Small entities affected by the proposed rule. The proposed rule would amend the definition of “creditor” in the Board’s Regulation V Subpart J to conform to the revised definition of that term in the Clarification Act. The proposed definition continues to refer to the FCRA definition of “creditor,” which references the ECOA definition of “creditor,” but limits the application of the red flags provisions to only those creditors that regularly and in the ordinary course of business: (a) obtain or use consumer reports in connection with a credit transaction; (b) furnish information to consumer reporting agencies in connection with a credit transaction; or (c) advance funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person. 12 U.S.C. 1681m(e)(4)(A). Creditors that advance funds on behalf of a person for expenses incidental to a service provided by the creditor to that person are excluded from the definition. Small entity creditors that do not meet this more limited definition would no longer be covered by the rule. However, small entities that are financial institutions would still be covered by the rule, regardless of whether they meet the revised definition of creditor.

The proposed rule would also update a cross-reference in the Red Flags rule to reflect the CFPB's rulemaking authority for the notice of address discrepancy provisions in the FCRA. This revision would have no effect on small entities because there is no substantive difference between the Board's definition of a "notice of address discrepancy" and the CFPB's definition.

3. Recordkeeping, reporting, and compliance requirements. The proposed rule does not impose any new recordkeeping, reporting, or compliance requirements on small entities. Small entities that no longer meet the narrower definition of "creditor" would not have to comply with the requirements of the Red Flags rule. However, small entity financial institutions would still be required to comply with the Red Flags rule, regardless of whether they meet the revised definition of creditor.

4. Other federal rules. The Board has not identified any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed revision.

5. Significant alternatives to the proposed revisions. The proposed revisions to the definition of "creditor" and the cross-reference to the definition of a "notice of address discrepancy" reflect statutory changes. The Board does not believe there are significant alternatives to these revisions. Although the Board has authority to determine through a rulemaking that any other creditor that offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft is subject to the Red Flags rule, the Board does not believe it is appropriate to use its discretionary rulemaking authority at this time.

III. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506;

5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Federal Reserve by the Office of Management and Budget (OMB). The proposed rule contains no requirements subject to the PRA.

List of Subjects in 12 CFR Part 222

Banks, banking, Consumer protection, Holding companies, Safety and soundness, and State member banks.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend Regulation V, 12 CFR part 222, as set forth below:

PART 222 FAIR CREDIT REPORTING (REGULATION V)

1. The authority citation for part 222 continues to read as follows:

AUTHORITY: 15 U.S.C. 1681b, 1681c, 1681m and 1681s; Secs. 3, 214, and 216, Pub. L. 108-159, 117 Stat. 1952.

2. Amend § 222.90 by revising paragraph (b)(5) to read as follows:

§ 222.90 Duties regarding the detection, prevention, and mitigation of identity theft.

* * * * *

(b) * * *

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4).

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3. Amend Supplement A to Appendix J by revising example 3. to read as follows:

Appendix J to Part 222—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

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Supplement A to Appendix J

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3. A consumer reporting agency provides a notice of address discrepancy, as defined in 12 CFR 1022.82(b).

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By order of the Board of Governors of the Federal Reserve System, February 10, 2014.

Robert deV. Frierson
Secretary of the Board.

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